UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT FULTON, SR.,	)	
	)	
PLAINTIFF	)	
	)	
v.	)	**Civil No. 95-173-P-H**
	)	
TOWN OF RUMFORD, ET AL.,	)	
	)	
DEFENDANTS	)	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

The plaintiff asserts federal civil rights claims and related state law claims arising out of his mistaken arrest. The defendants have moved for summary judgment. Viewing the summary judgment record composed under Local Rule 19, I conclude that summary judgment should be granted to all defendants except the actual arresting officer.

BACKGROUND

The Maine Drug Enforcement Administration ("MDEA") was conducting a drug sweep in Rumford on July 8, 1994. The defendant Tony Milligan was the MDEA officer in charge. He secured the cooperation of members of the Rumford Police Department, among them the defendant Officer Timothy Chapman, and of the Oxford County Sheriff's Department, including the defendant Officer Christopher Wainwright. Milligan conducted a morning briefing of all participants, providing each with the name, date of birth and last known address of the people to be arrested. One such arrestee was Robert Fulton, born in 1974 and residing on Cumberland Street. During the

briefing an unidentified Rumford police officer stated that Robert Fulton lived on Prospect Avenue. The defendant Wainwright headed the team assigned to arrest Robert Fulton; the defendant Chapman was on the team. The team went to Prospect Avenue. Wainwright and another officer went to the front door and spoke with Mrs. Fulton. Chapman and another officer went to the side porch and arrested Robert Fulton, Sr. after he identified himself as Robert Fulton. Robert Fulton, Sr., however, was 42 years old. After one of the officers announced that the arrest had been accomplished, the defendant Wainwright came around to the side of the house and, upon observing Robert Fulton, Sr., asked Chapman if he had confirmed the suspect's age. Chapman indicated that he had not, and within three minutes the handcuffs were removed from Robert Fulton, Sr., once he had indicated that he had a 19-year-old son named Robert Fulton.

Robert Fulton, Sr. has now sued Wainwright, Chapman and Milligan, together with the Town of Rumford and Oxford County, claiming a violation of his constitutional rights in connection with the arrest, as well as various state law tort claims.

FEDERAL CLAIMS

A. Wainwright and Oxford County

It is undisputed that the defendant Wainwright did not see Robert Fulton, Sr. before he was arrested and that he did not participate in the actual handcuffing. Wainwright saw Robert Fulton, Sr. only after he had been arrested and then proceeded promptly to correct the situation. There is, therefore, no basis for liability on the part of the defendant Wainwright in connection with the arrest.

The plaintiff also seeks to hold Wainwright liable on the basis of a concerted action theory, but that theory requires direct personal participation or initiation of acts by others that "the actor knows or reasonably should know would cause others to inflict the constitutional injury," Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 561 (1st Cir. 1989), quoting Springer v Seaman, 821 F.2d 871, 879 (1st Cir. 1987). Here, Wainwright neither saw Fulton nor participated in his physical arrest before it occurred. The plaintiff argues that Wainwright should be responsible because he led the team to a different address than the address on the warrant. (Wainwright actually maintains that the team went first to the Cumberland Street address and found no one living there, but this fact is disputed.) Under principles of qualified immunity, see Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987), it was not unreasonable for a law enforcement officer having the information given to the defendant Wainwright to proceed to the Prospect Avenue address rather than the Cumberland Street address. The plaintiff also intimates that Wainwright is liable for Chapman's mistaken act in arresting Fulton, Sr. because, under one version of the facts, Wainwright did not tell Chapman the age of the Fulton to be arrested. The plaintiff, however, has shown no basis for concluding that Wainwright reasonably should have known the missing birth date would cause a false arrest.

The actions of Wainwright are the only basis for any claim against Oxford County and, therefore, summary shall be entered on behalf of both Wainwright and Oxford County.

B. Milligan, Chapman and Town of Rumford

The defendant Milligan was not present at the arrest and could be held responsible only as a supervisor. There is no liability for respondeat superior under section 1983, however, unless a

supervisor acts with "reckless or callous indifference to the constitutional rights of others" and there is "an affirmative link between the supervisory official's acts or omissions and his subordinate's violation of the plaintiff's constitutional rights." Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87, 92 (1st Cir. 1994) (internal quotes omitted). The plaintiff has not shown reckless or callous indifference on the part of Milligan.

As for arresting officer Chapman, a reasonable law enforcement officer with information that the person to be arrested was 19 years old and lived on Cumberland Street would not have probable cause to arrest a 42-year-old individual of the same name at a different address. The evidence is in dispute as to whether Chapman was ever given the age or date of birth of the Robert Fulton to be arrested. Chapman has testified at his deposition that at the time of arrest he had no recollection of any age or date of birth. A factfinder is not required to believe that assertion, however, since there is (disputed) evidence that the information was earlier provided to him. Therefore, qualified immunity is not available (if at all) until these facts are settled at trial. Likewise, a factfinder could find that there was no probable cause for the arrest, no justifiable reliance on the warrant and that the officer acted unreasonably. See Hill v. California, 401 U.S. 797, 802-04, 91 S. Ct. 1106, 1110-11, 28 L. Ed. 2d 484, 489-90 (1971); Gero v. Henault, 740 F.2d 78, 84-85 (1st Cir. 1984), cert. denied, 469 U.S. 1191, 105 S. Ct. 965, 83 L. Ed. 2d 970 (1985). Since the facts are in dispute on this issue, summary judgment cannot be entered on behalf of the defendant Chapman.

A municipality like the Town of Rumford can be liable only if it has a policy, practice or custom of engaging in the constitutional violation, Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38, 56 L. Ed. 2d 611, 638 (1978), or shows deliberate indifference to the need to train its officers to avoid such constitutional violations. Canton v. Harris,

489 U.S. 378, 390, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412, 427-28 (1989). The plaintiff has not pointed to any plan, policy, custom or deliberate failure by Rumford that would bring it under any exception to the prohibition on respondeat superior liability. Accordingly, summary judgment is entered on behalf of the defendants Milligan and the Town of Rumford.

STATE CLAIMS

Because I am granting summary judgment on the federal claims in their entirety in favor of Wainwright, Milligan and Oxford County, I **DISMISS WITHOUT PREJUDICE** the state law claims against those defendants. See 28 U.S.C. § 1367(c)(3). With respect to the state law claims against the defendant Chapman, there is no suggestion in the record of "bad faith" that would prevent immunity from personal liability for intentional torts under 14 M.R.S.A. § 8111(1)(E). Chapman also has immunity under the discretionary function provision of the Maine Tort Claims Act, 14 M.R.S.A. § 8111(1)(C), in his choice to touch or handcuff the plaintiff in the course of the arrest.[1] The plaintiff has not responded to the defendants' arguments on Count VII, the Maine Civil Rights Act claim, and I therefore consider it waived. Accordingly, Chapman's motion for summary judgment is **GRANTED** on Counts II, III, IV, V, VI and, VII. The Town of Rumford remains in the lawsuit only to the extent it can have supervisory liability on the state claim in Count I.[2]

[1] There is no discretionary immunity for the ministerial act of arresting the wrong person under a warrant. Kane v. Anderson, 509 A.2d 656 (Me. 1986).

[2] Originally the Town appeared to argue that it was immune from any vicarious liability. Its most recent brief, however, indicates that insurance may be available, which would eliminate the immunity. 14 M.R.S.A. § 8116.

That leaves Count VIII (the federal claim against Chapman) and Count I (the state negligence claim for the arrest against Chapman and the Town of Rumford).[3]

All other pending motions are **DENIED**.

SO ORDERED.

DATED AT PORTLAND, MAINE THIS 24TH DAY OF JANUARY, 1996.

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

[3] To the extent Count V states a separate claim for negligent infliction of emotional distress, it either duplicates the negligence theory of Count I and the damages recoverable there or can be considered as part of Count I.